

# ARTICLES.

## ■ KEEPING ON-LINE SPEECH FREE

# Street Corners In Cyberspace

ANDREW L. SHAPIRO

**Y**ou probably didn't notice, but the Internet was sold a few months ago. Well, sort of: The federal government has been gradually transferring the backbone of the U.S. portion of the global computer network to companies such as I.B.M. and M.C.I. as part of a larger plan to privatize cyberspace. But the crucial step was taken on April 30, when the National Science Foundation shut down its part of the Internet, which began in the 1970s as a Defense Department communications tool. That left the corporate giants in charge.

Remarkably, this buyout of cyberspace has garnered almost no protest or media attention, in contrast to every other development in cyberspace—particularly Senator James Exon's proposed Communications Decency Act, which would criminalize "obscene, lewd, lascivious, filthy, or indecent" speech on computer networks. Yet issues of ownership and free speech are inextricably linked. Both raise the vexing question of what role—if any—government should play in cyberspace and, consequently, of what this new frontier will become.

The chorus of opposition to Exon's misguided proposal is right on; the bill deserves to be scrapped. But as cyberspace becomes privatized and commercialized, we should also be skeptical of the laissez-faire utopianism of many of Exon's critics. They say that cyberspace is a bastion of free expression and that users can regulate themselves. "No government interference!" is their rallying cry. In the context of censorship, this sounds right. But in the context of ownership, it is wrong. Speech in cyberspace will not be free if we allow big business to control every square inch of the Net. The public needs a place of its own.

This seems simple enough. And yet the issue of who owns cyberspace has been overlooked because it's difficult in the abstract to see what's at stake here. So let's get concrete: Consider two models of cyberspace that represent what total privatization deprives us of and what it leaves us with.

In the first model—this is what we're being deprived of—you use a computer and modem to go on-line and enter a virtual world called Cyberkeley. As you meander down the sidewalk, you find a post office, libraries and museums, shopping malls full of stores, and private clubs that service a limitless variety of clientele, from those who want spiritual guidance, tips on gardening or legal advice to those with a penchant for

live sex or racist hatemongering. You also encounter vibrant public spaces—some large like a park or public square, others smaller like a town hall or street corner. In these public forums, some people are talking idly, others are heatedly debating social issues. A few folks are picketing outside a store where hard-core pornography is sold, others are protesting the post office's recently increased mail rates and one lone activist outside the Aryan Militia's hangout hands out leaflets urging racial unity. Most people are just passing through, though you and they can't help but take notice of the debaters, the demonstrators, even the leafleter.

In the second cyberspace model—which is what we're getting—you enter an on-line world called Cyberbia. It's identical to Cyberkeley, with one exception: There are no spaces dedicated to public discourse. No virtual sidewalks or parks, no heated debate or demonstrators catching your attention, no street-corner activist trying to get you to read one of her leaflets. In fact, you can shape your route so that you interact only with people of your choosing and with information tailored to your desires. Don't like antiabortion activists, homeless people, news reports about murders? No problem—you need never encounter them.

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## *Third Wave lawmakers say that cyberspace should be privately owned and operated.*

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Cyberbia is tempting. People can organize themselves in exclusive virtual communities and be free of any obligation to a larger public. It is, perhaps, the natural result of a desire for absolute free choice, customization and control. But, at least for now, cyberspace must be treated as an extension of, rather than an alternative to, the space we live in. Consequently, it should be clear that Cyberbia—like suburbia—simply allows inhabitants to ignore the problems that surround them off-line. In Cyberkeley, by contrast, people may be inconvenienced by views they don't want to hear. But at least there are places where bothersome, in-your-face expression flourishes and is heard. These public forums are essential to an informed citizenry and to pluralistic, deliberative democracy itself.

Unfortunately, cyberspace is shaping up to be more like Cyberbia than Cyberkeley. That's because the consensus among on-line boosters—from the terminally wired hackers to the cyberwonks at the Electronic Frontier Foundation to Newt Gingrich, Al Gore and other Third Wave lawmakers—is that all cyberspace should be privately owned and operated. While their fears of government abuse or inefficient centralization may be legitimate, presenting the choice as one between totalitarian control and a total absence of publicly owned space is misleading. These extreme alternatives prevent us from moving toward something like Cyberkeley—a model

of cyberspace that is mostly private, but which preserves part of this new domain as a public trust, a common space dedicated to citizens' speech. Without this hybrid vision, it is unlikely that we will realize the democratic possibilities of this new technology.

All this becomes readily apparent if one steps back from the cyberspace framework and contemplates how our anemic public discourse came to be. By the 1960s, crucial victories for freedom of expression had been won in the courts against government attempts to suppress labor activists, Communists, civil rights activists and war protesters. At the heart of these victories was the public forum doctrine, which minimizes government control of speech in areas such as sidewalks and parks, disallowing restrictions based on content or viewpoint. As the Supreme Court said in 1939, these special locations were "held in trust for the use of the public . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions."

From the 1960s to the present, as Owen Fiss of Yale Law School has argued, speech on the street corner has become increasingly silent as a result of two concurrent trends: the rise of electronic media and the privatization of spaces that had previously been public—a prime example being the center of commerce, now the shopping mall. For a brief time, with the F.C.C.'s fairness doctrine for broadcasters and a 1968 Supreme Court decision that granted labor picketers access to a privately owned mall, there was reason to believe that speech might remain diverse and unfettered in the new locales. But the Supreme Court slowly and surely chipped away at what Justice William Brennan called "robust public debate." It limited citizen access to radio and television, and it allowed speech to be restricted not only in private shopping malls but also in certain publicly owned spaces, such as airports and post offices [see David Cole, "In Your Space," March 14, 1994]. Property owners and even municipalities acting in "private" capacities were able to use the First Amendment to exclude dissenting voices by arguing that they should not have to associate with speech with which they disagreed.

Given this history, it should be clear how important pub-

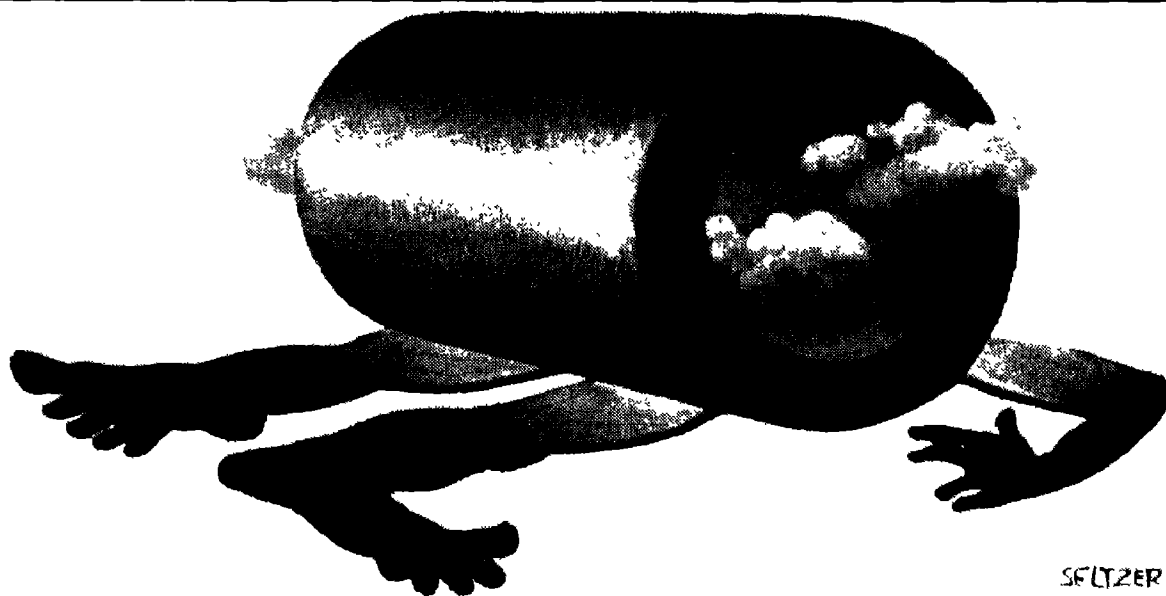
lic forums in cyberspace could be—as a way of keeping debate on-line robust *and* as a direct remedy for the dwindling number of such spaces in our physical environment. A remarkable incident shows further why this is so.

In 1990 the on-line service Prodigy started something of a revolt among some of its members when it decided to raise rates for those sending large volumes of e-mail. Protesters posted messages claiming they were being penalized for speaking frequently; they sent e-mail to Prodigy's on-line advertisers threatening a boycott. In response, Prodigy not only read and censored their messages, it summarily dismissed the dissenting members from the service. A spokesman for the company, which is a joint venture of Sears and I.B.M., wrote unapologetically in a *New York Times* opinion piece that the company would continue to restrict speech as it saw fit, including speech criticizing the company.

This example, extreme as it is, demonstrates the difference between Cyberkeley, which has public forums, and Cyberbia, which does not. In the latter, there is no way for the aggrieved Prodigy members to picket the on-line service in an area that its patrons will see (nor is there any higher authority to which they can appeal); thus the company has no incentive to refrain from suppressing dissent. Sure, the dissenters can open their own shop, but they'll probably be lost in some distant corner of cyberspace. By contrast, in Cyberkeley, the protesters would have access to the virtual sidewalk outside Prodigy; they would be able to protest the company's rate hike—and the fact that they were kicked out simply for airing a contrarian view—in a way that Prodigy members and non-members alike would hear.

Undoubtedly, some will argue that the Prodigy incident was an anomaly and that cyberspeech is already as free as it needs to be. But like the protests of the Prodigy dissidents, all speech in cyberspace is, in three fundamental ways, less free than speech in a traditional public forum.

First, cyberspeech is expensive, both in terms of initial outlay for hardware and recurring on-line charges. For millions of Americans, this is no small obstacle, especially when one considers the additional cost of minimal computer literacy. While



it is true that speech becomes cheaper once you've gained access to cyberspace—sending a message to 1,000 people costs little more than sending it to one—the initial threshold cost of this entry remains prohibitively high; the specter of information haves and have-nots is already upon us. This problem might be alleviated somewhat through subsidized access to cyberspace via public computer terminals (which have been established with success in Santa Monica and other cities), lower connection costs for low-income users (as with telephone service) and even something as idiosyncratic as Speaker Gingrich's tax breaks for laptops.

Second, speech on the Net is subject to the whim of private censors who are not accountable to the First Amendment. More and more, travelers in cyberspace are using commercial on-line services such as America Online and Compuserve, which, like Prodigy, have their own codes of decency and monitors who enforce them. Even those who prefer the more anarchic Usenet discussion groups are subject to regulation by self-appointed system operators and moderators. Since these censors are private agents, not state actors, disgruntled users have no First Amendment claim. Fortunately, most monitors, even at commercial on-line services, are not heavy-handed. But this is not always the case and, more important, there is no legal way to insure that it will be.

Third, speech in cyberspace can be shut out by unwilling listeners too easily. With high-tech filters, Net users can exclude all material from a specific person or about a certain topic. This feature may protect children from inappropriate speech, but adults should not be able to steer clear of "objectionable" views, particularly marginal political views, so easily.

Together, these three points demonstrate why on-line speech is less free than it seems and, again, why Cyberkeley is preferable to Cyberbia. They also show why the cyberworks' solution to Net regulation—a laissez-faire print model that treats all users as writers rather than, say, speakers—is inadequate: We're either paying to publish in mass-circulation periodicals where editors are free to censor us or we're writing pamphlets no one knows about because there's no public space in which to distribute them.

So how do we reverse the onslaught of commercialization and move from Cyberbia to Cyberkeley? Congress could

recognize the important public function of private on-line services and thus require them to save a place for dissenting speech, just as the Supreme Court required a privately owned "company town" to do in 1946. Eli Noam of Columbia University suggests as much when he says that computer networks "become political entities" because of their quasi-governmental role—taxing members, establishing rules, resolving conflicts. However, this remedy would probably be as unpopular today among courts and legislators as newspaper right-of-reply statutes and the F.C.C. fairness doctrine.

A more appropriate solution might be for Congress and state and local governments to establish forums in cyberspace dedicated explicitly to public discourse. This entails more than just setting up a White House address on the Internet or even starting the virtual equivalent of PBS or NPR. These public forums must be visible, accessible and at least occasionally unavoidable—they must be street corners in cyberspace.

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## *Government should promote speech that is drowned out by the voices of the rich and powerful.*

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Through regulation or financial incentives, Congress might be able to get users of commercial and academic on-line services to pass through a public gateway before descending into their private virtual worlds. This gateway could provide either a comprehensive list or a representative sample (depending on technological capacities) of issues that are being discussed in public cyberforums, which the user can—if she chooses—enter and exit with a simple click of the mouse. The entry point might also register how many citizens are speaking in each forum and how long the discussion there has been going on.

Though Net users might initially see the public gateway as an imposition, it really isn't different from the burden of exposure that they accept in their everyday lives. To get to a store or private club one must, at least momentarily, traverse the square or travel the street. As on a real public sidewalk, a virtual pedestrian can try to ignore what's there and pass right by. Most probably will. But some will be enticed to listen and even to argue. More important, all will have at least the opportunity to hear truly free speech outside the control of private interests—and, like expression in any public forum, free from government censorship.

Even if Cyberkeley is technically feasible, skeptics of regulation from the left and right will question whether it is legal or even good policy. And this is precisely where the false choice between libertarianism and authoritarianism should be abandoned. In a liberal democracy, the people have a right to demand that government promote speech in a content-neutral way, particularly speech that is drowned out by the voices of the moneyed and powerful.

Admittedly, this state obligation to make speech available

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that otherwise would be unheard may seem unfamiliar to First Amendment absolutists who take it as an article of faith that, in all matters pertaining to freedom of expression, government should simply stay out of the way. But in fact, just as the state protects citizens from unfair market conditions, it also has a role to play when the marketplace of ideas fails and there is outright domination of some views. This is the same reason our government gives—and should give more, as European nations do—grants to marginal artists, postal subsidies to small magazines of opinion and free use of cable channels to community organizations. As the Supreme Court said last year in *Turner Broadcasting v. FCC*, “Assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment.”

Cyberkeley might also help solve other Net snafus. For example, controversial political discussions on-line are sometimes destroyed by a phenomenon called “spamming,” in which an individual endlessly replicates a message in order to silence his opponents. Open discourse is effectively shut down. In a public forum, government cannot censor speech, but it can impose minimal “time, place and manner” restrictions, particularly in order to maintain the fairness of public debate. Thus, just as the state might prohibit use of a 100-decibel loudspeaker at 2 A.M. in Times Square, it might also turn down the volume on those who drown out other speech by spamming.

More mundane problems might also be ameliorated. For example, as political campaigns buy time on commercial on-line services, public cyberforums could take on an important role for candidates with little money. While Bob Dole is chatting with America Online subscribers, his grass-roots opponents should be able to set up a soapbox on the virtual sidewalk outside.

If cyberspace is deprived of public forums, we'll get a lot of what we're already used to: endless home shopping, mindless entertainment and dissent-free chat. If people can avoid the unpalatable issues that might arise in these forums, going on-line will become just another way for elites to escape the very nonvirtual realities of injustice in our world. As the wired life grows exponentially in the coming years, we'll all be better off if we can find a street corner in cyberspace. □

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## ■ DOWN ON THE DUMP IN NEW YORK Privatize Trash? A Cautionary Tale

DAVID HIGBY

Not long ago, the 60,000 citizens of New York's Washington County, a poor dairy farming community between the upper Hudson River and Vermont, awoke to discover that they owned a high-tech trash incinerator whose construction costs exceeded estimates by 200 percent and whose appetite for garbage was ten times what the county could satisfy. As a result of the decision to build the facility, the county has endured the largest corruption trial in its history, the suicide of a local legislator and the spectacle of public officials being found guilty in federal court of violating the civil rights of their own constituents. At a time when politicians of both parties increasingly tout privatization as a painless, efficient panacea, corporate and professional predators stand ready to seize the opportunities provided by this rhetoric, and secretive public/private “development agencies” serve as often-corrupt dealmakers. The history of Washington County's incinerator is a cautionary tale.

Back in 1982, when an ambitious young lawyer named William Nikas took his seat as supervisor of Kingsbury, the largest of the county's seventeen townships, the idea of incinerating Washington County's trash seemed dead. In his election campaign, Nikas had argued convincingly against it on economic and environmental grounds, favoring instead a new landfill. But Nikas also served as chairman of the supervisors' Solid Waste Committee, and by August 23, 1984, he changed his mind. On that day, Robert Barber, the region's largest trash hauler, along with his attorney from the prominent local firm of Miller, Mannix, Lemery & Pratt, went before the committee and outlined a plan to build a trash incinerator in Hudson Falls, Washington County's largest village and part of Kingsbury. It would serve three counties: Washington, which would host the incinerator; Warren, which contains Glens Falls, the area's only city; and the more northern Essex, which would get the project's landfill and receive the incinerator's toxic ash.

The Miller/Mannix attorney conceded that other such projects had run into financial difficulty around the country, but he reassured the committee by saying that the Barber group had been working closely with Smith, Barney, Upham, Harris, the large Wall Street brokerage firm, to set up the financing. No one at the meeting questioned Miller/Mannix's rosy prediction that the facility would be privately financed and come in at \$31 million, or that the tipping fee, the cost per ton to dispose of trash, would be \$8. When Nikas took this good news

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